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Is the Future of Development Regulation Based in the Past? Toward a Market-Oriented, Innovation Friendly Framework

Samuel R. Staley
Senior Fellow
Reason Foundation

And

Eric R. Claeys
Assistant Professor of Law
St. Louis University

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Please direct all correspondence to: Samuel R. Staley, 3872 Wead Place, Bellbrook, Ohio 45305,
(v) 937.848.8896, (e) samuelrstaley@aol.com

Abstract

This paper presents an alternative framework for development review and local planning that is more open and consistent with promoting innovation in housing and land use. The current approach is a “closed system” framework, where innovations can be adopted only if they were anticipated in the local comprehensive plan or a political majority can be convinced to support the proposal. The alternative framework, rooted in the American legal tradition of natural rights, builds in a presumption in favor of innovation in land use and housing subject to specific limits and qualifications. The new system is “open ended” in that innovations are encouraged as long as they do not limit the rights of other property owners or the community and impacts are

mitigated. The new framework has the practical advantages of recognizing the dynamic nature of urban development, promoting innovation, and subjecting land-use regulation to objective, performance-based measures.

1. Introduction

It is harder than ever to develop new stocks of housing in the regulatory environment that currently prevails in most local governments. Local anti-sprawl coalitions are influential. The anti-sprawl movement has encouraged the general public to participate more actively and scrutinize more closely development proposals, to protect public interests including “protecting” open space and ensuring “appropriate” design (Staley 2001). In many regions, parochialized interest groups have leveraged the principles of “Smart Growth” architecture and planning to thwart new development and thereby to preserve the existing character of their communities. Such review and politicization then lengthen and make more uncertain the development approval process, which in turn make it ever-more expensive to develop new housing stock. Not surprisingly, land developers have gravitated toward projects with higher margins—usually established housing products in high growth areas—to ensure revenues will cover these higher costs.

At the same time, real estate development is becoming more complex. Suburban municipalities on urban fringes have become more densely populated, as vacant land has been developed outside but near the urban core. The residential market is becoming more diverse. Smaller families, empty nesters, and younger professional couples prefer alternatives to the traditional single family residence, but they still prefer to live in the suburbs for reasons relating

to work or lifestyle. Not surprisingly, in suburban areas, buyers are demanding townhomes or apartments in closer proximity to urban services (Myers & Gearin 2001).

Unfortunately, at the local level, the current regulatory framework is poorly suited to handle these complexities. The conventional approach to development approval encourages planners to meet immediate needs, as expressed during local elections and by local representatives. Moreover, the conventional development approval process imposes substantial transaction costs since deviations from the master plan or zoning map are negotiated on a case-by-case basis. This approach does *not* encourage municipal officials, citizens, or planners to anticipate future needs or accommodate future residents. High transaction costs limit the ability of the private sector to experiment with new types of housing and urban design or invest in development projects with low profit margins such as affordable housing. Because the current regulatory system responds to the immediate needs and concerns of present residents, it tends to be very parochial and short term in its focus. If anything, then, the current system could be said tacitly to discourage local planners from anticipating the demands of future residents.

These trends in development and regulation have created interest in considering new approaches land-use regulation. This paper takes a step toward meeting these needs by presenting an alternative framework for evaluating and assessing development proposals that emphasizes flexibility, adaptability, and innovation. The framework draws on insights from nineteenth century U.S. land use law that favored innovation and individual initiative and builds these principles into contemporary planning and land use regulation. This framework builds on principles of property and regulatory theory that prescribe as the proper object of regulation the ordering of free individual initiative, but also recognizes there are important public interests that must be served and protected through legislative deliberation. This framework helps focus and

simplify the policy decisions planners and elected officials need to make while broadening their ability to accommodate new ideas and trends. In the short term, focus and simplicity expedite the approval process and reduce the uncertainty associated with obtaining development approvals; over the long term, they make the regulatory process more flexible and adaptable.

2. Closed System Development Approval

Development approval in the United States is highly localized and characterized by a “closed system” decision making process (Staley 2001a). A closed system is characterized by a defined set of stakeholders that can directly influence the outcome of a decision. These outcomes are also procedurally and legislative bounded. In the more extreme cases, such as Florida, Oregon, Washington, or Hawaii, state growth management laws have vertically integrated plans that require land use and planning consistency between local, regional, and state level plans. In Florida’s case, the state plan is binding and is binding on local plans. Changes must be approved at the local level and by state planning authorities.

In American planning, the primary stakeholders are professional planners and elected officials who (at least in principle) represent the interests of existing residents and citizens. City officials and professional planners have the statutory authority to approve or reject development proposals. Other stakeholders with indirect influence over the approval process include developers and property owners, who bring development proposals before planning boards and elected officials, and citizens who actively participate in the deliberation process through public hearings and appointments to advisory boards such as planning commission. These stakeholders often have the procedural flexibility to be active participants or objectors to proposals because

few public bodies limit the standing of citizens participating in the development approval process.

Indeed, the default has been to expand public participation to include special interests (e.g., environmental groups) as a way to broaden debate and further influence the outcome of specific development proposals. Excluded from this process on the interests of future residents, neighboring jurisdictions, and (in most cases) non-resident third parties. American planning procedures place a high value on public participation, and current trends are to expand the citizen participation component of development approval (Staley 2001a; Kaufman and Escuin 2000).

Final development approval occurs almost exclusively within a legislative approval process that puts significant weight on current resident input and the final authority in elected officials who represent existing residents. This has become problematic as land development has become more customized and more communities have adopted overlay zoning districts, PUD requirements, and other specialized planning tools to exert more public control over land development within their communities. The Not-In-My-Backyard, or NIMBY syndrome, may well be an inherent outcome of contemporary development regulation and approval procedures.

This closed system becomes problematic when communities are faced with accommodating innovative development proposals. The very nature of innovative proposals implies proposed projects will break from traditional existing patterns of development. Yet, planning procedures give the most “voice” to participants with an inherent interest in preserving existing development patterns, and few, if any incentives, to consider the interests of future residents or how the community will change. To some states, locking communities into known patterns of development is state law. State growth management plans and consistency requirements require development to conform to patterns established through local, regional, and

state land use plans. Deviations must be subject to onerous review procedures because the presumption is against spontaneous or unanticipated changes in land development (Staley and Gilroy 2001). As a result, decisions on specific development proposals are made within a temporally constrained framework and are characterized by high transaction costs.

2.1 Transaction Costs and Land Development

Transaction costs are the costs of negotiating, monitoring, and enforcing contracts (Coase 1937; 1960). Historically, economies grew and diversified because well-defined (and enforced) contracts reduced transaction costs, encouraging innovation, investment, and diversification (North 1990). Transaction costs are important in land use planning and development approval because they are inherent in regulatory approval and deliberation. Since development projects require regulatory approval from a legislative body, costs are incurred through the presentation of plans, deliberation and evaluation of those plans, and their subsequent approval and monitoring (Lai 1997; Staley 1997). Lai (1996a; 1996b) has pointed out that poorly designed or highly uncertain systems of planning and zoning discourage investment, particularly in areas with weak demand for property development. Staley (2001b) found that uncertainty in the development approval process had significant negative impacts on housing production in his analysis of ballot-box zoning in 63 cities in Ohio. In fact, the planning variable had a larger impact than income, population growth, transportation spending, debt, and geography. Malpezzi (1996) also found that moving from a lightly regulated to a highly regulated planning environment reduced housing unit production by 42 percent. (See also Green & Maplezzi 2003:146-156) Thus, the impact of the current regulatory process on housing and development is significant.

These transaction costs are imbedded in current system of zoning, planning, and development approval. Most communities that plan have land-use maps and zoning codes that lay out what kind of development can occur at what place and at what densities. Deviations from these plans require the property owner to request permission from the local city council, commission, or other legislative body. Local politics tends to reinforce existing land use patterns rather than accommodate changes.

One of the best illustrations of (and perhaps most studied) this effect on land use may be Ventura County, California. Ventura County is a coastal area about 40 miles northeast of Los Angeles. The county is particularly well suited example because it has been implementing a coordinated and focused growth management program for more than 30 years (Fulton, et al. 2001). More importantly, the county and its ten cities went to the ballot box to adopt strong growth boundaries between 1995 and 2000 in order to preserve open-space. This implied that zoning and planning would have to accommodate higher densities to meet the county's growth projections through 2020. An analysis of 120 projects encompassing more than 12,000 housing units found that Ventura County cities consistently approved projects well below the necessary densities to meet the county's population targets, often falling 20 percent or below zoned capacities and 45 percent below plan capacities (Fulton et al. 2001). In short, cities continued to approve housing projects that reflected historical patterns of development.

A follow-up analysis revealed that higher planned capacities could often not be sustained politically because changing patterns embraced by professional planners and developers were not supported by the general public (Fulton et al. 2003). Environmental regulations also appeared to force densities lower in some cases (although this may be unique to the California development environment). More importantly, perhaps, detailed plans laying out the future development of an

area appeared more successful at meeting their density goals than others. The researchers attribute this success to the higher degree of specificity about the actual build out of the area as well as a more extensive mechanism for including citizens in the decisionmaking process. In short, the specific plans are much closer to an actual contract that can be enforced. Obtaining approval for a specific plan, however, requires substantial up front costs in time and resources.

2.2 Limits to the Existing Planning Process

While the specifics of planning in Ventura County are clearly constrained by California's development codes and procedures, many aspects of the county's development procedures are generalizable. Planning Unit Development (PUDs), overlay zoning districts, and, most recently, form-based codes like those advocated by New Urbanists, are all attempts to modify the general planning framework to get streamlined approval for specific types of development. However, these tools are still largely ad hoc, and represent attempts to tinker around the edges of the general planning framework.

In cases where PUDs become the primary vehicle for gaining development approval, the alternatives compound the problems that discourage innovation by allowing city officials and citizens to micromanage projects and lengthen the approval process. Developers often opt for a PUD because it provides more design flexibility, but the trade off is longer approval times and more detailed government control of the project. Indeed, in these cases, cities have moved from a planning process that gives limited administrative approval to some types of development to one that requires negotiated outcomes for every proposal. Developers in strong housing markets find this approach a preferred alternative because they can recoup the added costs through higher prices.

Unfortunately, few researchers have been able to analyze development approval process consistently across jurisdictions and states. A notable exception is Malpezzi's (1996) analysis of development regulation in American metropolitan areas. Malpezzi found that metropolitan areas with higher regulatory costs also experienced higher housing costs and lower housing production.

The existing planning framework provides little incentive or opportunity to consider information independent of the narrow questions being considered by the planning board or city council. Development proposals are considered primarily with a view toward their effects on the current community—preserving the existing “character” of the community. They tend not to be considered in relation to past development, potential future residents, or even effects on neighbors. Moreover, in more and more cities, accommodating spontaneous change and community evolution is discouraged as communities adopt specific “visions” for their community and implement specific planning documents (e.g., zoning codes, comprehensive plans) that attempt to bring the land market into conformance with that vision.

Taken together, these factors impose social costs because they discourage innovation in land-use planning. Green and Malpezzi (2003), in fact, note that communities with more development regulation do not experience significant improvements in environmental quality or fiscal health, although these and other indicators are often hard to measure.

To the extent a commission or council considers the broader public interest, decisions will be made in the context of the community's comprehensive plan and how well the proposal conforms to the plan. Neither city councils nor planning commissions are required to consider how the community or region might develop independently of the comprehensive plan, or how near-term decisions might influence long-term development patterns. Public hearings are

important tools used to collect information about community interests, but such meetings often focus on problems specific to the proposal. When the council or commission imposes requirements as conditions for approving a proposal, the conditions tend to focus on mitigating potential spillover impacts on neighbors and the community. In this environment, developments that most closely resemble existing land use patterns have the greatest likelihood of approval while those that deviate from the existing pattern are least likely to be approved.

Housing is not the only area where innovations may be discouraged. Innovative proposals, by their nature, seek to develop alternatives to existing development patterns. Traditional suburban shopping malls, for example, are increasingly being replaced by “Lifestyle Centers”. Lifestyle centers are characterized by mixed residential and commercial uses at significantly higher densities than surrounding neighborhoods. These designs are likely to become the dominant form of commercial redevelopment in American urban areas (Gose 2004). Similarly, New Urbanist projects attempt to create a wider range of housing—single family, townhome, apartment—in a more compact, walkable neighborhood style that departs dramatically from traditional suburban development. These innovations may meet the new needs and preferences of evolving communities, but not until they survive a resistant development approval process.

2.3 Toward an Alternative Regulatory Framework

Communities are thus faced with a conundrum. They cannot directly govern housing choices, neighborhood choice, or owners’ mobility. Household sizes grow or decline from one generation to the next. Homeowners often assume different occupations and needs from one generation to the next. As the homeowners and their needs change, the demands on public

services usually change accordingly. Yet the planning process often frustrates the land market as it tries to adapt to changing patterns of development. Institutionally, that process builds in a legal presumption that most changes will negatively impact the existing community. A city's comprehensive plan identifies the land uses and patterns that are presumptively acceptable. Proposals and changes that deviate from the plan must be evaluated on a case-by-case basis, no matter how big or small. Thus, most innovations will encounter resistance in the approval process. That resistance reduces social welfare to the extent that it guarantees that changing needs continue to remain unmet needs.

In many situations, therefore, the conventional planning process is a poor vehicle for meeting the changing needs of a community. Contemporary land-use regulation should thus consider laws and procedures that might counteract these institutional tendencies to preserve the status quo and discourage changing land-use patterns. To be sure, one can raise hard questions about how appropriately to balance flexibility and adaptability against the goods that zoning's conservative tendencies encourage. Such goods include, among other things, owners' sense of community, the financial stability of the prices of their homes, and the long-range stakeholders' interest in schools, libraries, and other public goods in their neighborhoods. (See, for instance, Fischel (2003).)

Nevertheless, alternative forms of regulation may make the development approval process more adaptable. Moreover, these new forms of regulation should move beyond the ad hoc approaches found in "add ons" to existing regulations such as PUDs, overlay zoning districts, or specialized zones, and articulate broad principles and guidelines that can handle a broad range of innovations in housing and land development. An alternative, general framework

for regulating land development that increases flexibility while protecting important public interests should meet two primary goals:

1. To leave local real estate markets with enough flexibility to meet changing needs and preferences for current and prospective residents; and
2. To ensure the public health, safety, and welfare are safeguarded.

Then, to implement these overarching goals, the approval process should be revised to take into account the following behavioral generalizations and specific policy objectives, set forth in Staley & Scarlett (1998):

- Community residential and development patterns tend to evolve as people move in and out of a community and as the wider region evolves
- Dynamic real-estate markets can adjust to meet the changing needs of residents and businesses more effectively than master land-use and transportation plans that hardwire existing land-use patterns into place;
- Public objections to proposals often tend to reflect narrow local interests than larger community impacts, and most local participation comes in the form of objections to proposed changes to the character of the community;
- Political decisionmaking therefore often encourages local participation at the costs of being slow, deliberate, and inefficient; and
- The easiest ways to streamline the review process are, first, to concentrate political review on whether and to what extent new development will inflict concrete spillover effects on neighbors and the general public, and second, to discourage the review process from considering questions of aesthetics and overall design.

3. Back to the Future?

Zoning has been a mainstay of American land-use regulation for more than eighty years. Comprehensive planning, while not as widespread, has been in place for almost as long. Moreover, mandated comprehensive planning has become a staple of planning statute reforms, particularly under the banner of Smart Growth. Current planning's institutional design hardwires into land-use law strong preferences for intense local participation and against changes in local land-use patterns. These preferences are reinforced strongly by ideological commitments reflected in the regulatory practices, case law, and practical scholarship that have accumulated on top of zoning's original foundations (Claeys, 2004). Taken together, these institutions and policy preferences make it difficult to imagine alternative forms of regulation.

In these circumstances, one way to consider new visions for the future to examine the tradition of land-use regulation that the first wave of zoning laws displaced. This earlier tradition is important for several reasons. First, and above all else, it was grounded in an understanding of regulation based on a strong form of property rights. The contours of these property rights were drawn to conform to principles of accommodating change and innovation. These principles recognize

- that owners tend to put their properties to a wide range of incommensurable uses;
- that these uses are dynamic more often than static;
- that owners often have better information about their uses and purposes than planners and local majorities; and so forth.

Because of these starting premises, this tradition made hard and clear choices to distinguish between problems that could be regulated effectively by centralized public control and problems that could not.

3.1 Natural-Rights Principles of Land-Use Regulation

Natural-rights theory decentralizes by prescribing a system of regulation that protects owners against tangible disturbances, including noise and pollution. By the same token, because this system of regulation refrains from controlling land uses that do not inflict tangible disturbances or spillovers, it leaves people otherwise free to put their own lots to their own uses. *As a result, regulations that follow natural-rights principles make a sharp trade-off for diversity and change and against homogeneity and continuity.* These preferences stand in stark contrast to the tendencies reflected in contemporary land-use regulation, but they are crucial for a regulatory system that promotes innovation.

Natural-rights theory takes a different view because it emphasizes that property and its regulation should be grounded in the protection and encouragement of freedom. In other words, individuals should be allowed to experiment with different ways of using their property. The approach is very “open ended” in the sense that land-use choices and opportunities are not prescribed through statute or administrative rules (e.g., zoning codes). As a fundamental principle, then, natural rights theory embraces land-use innovation although there are important qualifications and limits.

In natural-rights theory, the right to property is just one extension of the general right of freedom known as natural liberty. James Wilson, drafter of the Constitution, member of Congress, and U.S. Supreme Court Justice, defined “natural liberty” in a series of law lectures as

a person's "right to exercise his powers for his own happiness . . . in such a manner, and upon such objects, as his inclination and judgment shall direct; provided he does no injury to others; and provided more publick interests do not demand his labours." (Wilson 1791, p. 1:242.) The focus of this definition is on the person's freedom--to connect his own active and intellectual powers to his own preferred objects.

The natural right to property applies this broad understanding of natural liberty to the specific case of property. In part, the institution of property recognizes a connection between work and reward. People have an inherent motivation to work to provide for their own needs and wants. James Kent, a New York state judge and an author of a leading nineteenth-century legal treatise, wrote that "the sense of property is graciously implanted in the human breast, for the purpose of rousing us from sloth, and stimulating us to action." (Kent, 1827, p. 2:257.) Property orders this stimulus so that each individual may use his own active and productive talents to provide for his own well-being. (*Van Horne's Lessee*, 1795, p. 310.)

Natural property rights also take their shape from the deep differences in the ends to which and ways in which people use their own possessions. All people share more or less in common the same passions to acquire, produce, and be industrious. To that extent, property protects common rights and interests. However, people apply these passions to different degrees and to different purposes. As James Wilson explained, "[m]any are the degrees, many are the varieties of human genius, human dispositions, and human characters. One man has a turn for mechanicks; another, for architecture; one paints; a second makes poems; this excels in the arts of a military; the other, in those of civil life. To account for these varieties of taste and character, is not easy; is, perhaps, impossible." As a result, no law of nature can say that some legitimate uses of property are intrinsically better than others. Indeed, better to let a thousand flowers

bloom, Wilson explained, because “varieties of taste and character induce different persons to choose different professions and employments in life: these varieties render mankind mutually beneficial to each other, and prevent too violent oppositions of interest in the same pursuit.” (Wilson, 1791, p. 1:240-41.)

Thus, regulation based on natural property rights refrained from picking and choosing among property uses. Instead, it would protect in each owner a zone of freedom to encourage the active and productive passions that all men share in common. This principle has important implications for how communities can accommodate innovation in land use and development.

3.2 Regulation and Innovation

When “property” is conceived in this way, it follows that “regulations” are laws that protect and encourage the free use and enjoyment of property. In natural-rights theory, “regulation” has a much narrower meaning than the meaning used by contemporary policy makers, particularly in the realm of land-use planning. Rather than meaning “any restraint on the use of property for any purpose chosen by the public,” it comes to mean “a law that makes rights regular.”

One way that laws “regulate” natural property rights is to define each person’s equal share of rights, and then protect each individual from encroachments by neighbors who claim more than their equal shares. For example, a law against trespass regulates property rights by stopping neighbors from overstepping their property and building an encroachment on the land of a nearby owner. Once such harm-prevention laws define a baseline of equal rights, a narrower set of laws “regulate” such rights by encouraging their free exercise.

Such laws do so most often by defining streamlined procedures that make it easier for owners to use or transfer their property cleanly. Title and conveyancing laws regulate land in this respect. In the short term, title and conveyancing laws seem to restrain property rights. It is costly and time-consuming to pay surveyors, title insurers, title companies, and the local registrar of deeds to consummate a sale of land. Over the long term, however, title and conveyancing laws enlarge property rights. Because they create a clear and orderly—a regular—system for transferring a highly valuable asset from one owner to another, they give new owners more security of ownership than they could otherwise have. (Claeys 2003, pp. 1553-55, 1570-74; Epstein, 2003, pp. 2-3.)

Establishing a principled basis for regulating the use of land is far more difficult than regulating title, the right to sell it, or the security of ownership protected by trespass. Title, conveyancing, and trespass laws impose more or less the same requirements on all land owners, no matter how differently different owners intend to use their lots. For instance, although the laws of trespass impose legal burdens on quarry owners, construction companies, and other land uses that occasionally and inadvertently blast debris onto neighboring land lots, virtually everyone agrees that such trespassers deserve to be under such burdens because they invade their neighbors' property rights. By contrast, intuitions vary much more when it comes to competing land uses.

Most observers agree that a company takes a homeowner's use rights if it builds a factory next to the owner's home, but they will split quite sharply about what to do when the company builds the factory next to undeveloped property, and the owner of that property then builds a home on it later. Similarly, opinions split about whether a home owner should have the right to

sue a neighbor for leaving a half-repaired car on his front lawn, for building a cell-phone tower on his property, or building a small apartment complex in a residential neighborhood.

The simplest way that natural-rights approach solves most of these problems is by resorting to two principles: a physical-invasion test, and a principle of reciprocity, or “live and let live.” The natural-rights approach does not require any single legal rule; it merely prescribes that regulators apply whatever positive laws that best approximate its conception that owners are entitled to a zone of free action, proportionate to their property, within which to decide how to use it for their own ends.

The physical-invasion test goes a long way toward capturing this idea. It performs this function in the law of battery and trespass. When someone punches his neighbor in the face, or throws a rock onto his neighbor’s property, we are confident that the puncher or rock-thrower has invaded the neighbor’s rights. The touching of the body by the fist is a doctrinal way of expressing the concern that the puncher has made the punchee less secure that he can use his own body for his own purposes; the touching of the land by the rock expresses the same concern about the land owner’s future control and use of the land. The same insight can be applied to land use. Smokes, noises, smells, seeping water, and other similar invasions all restrain the free choice of a neighbor to put her property to any of a wide range of legitimate uses. (Epstein, 1979, pp. 56-60; Claeys, 2003, pp. 1585-87.)

The physical-invasion test performs three important functions. First, it screens out from land-use regulation aesthetic controls. Doctrinally, eyesores are not proper objects of regulation because they do not inflict physical disturbances on nearby land. Substantively, the absence of invasion expresses a concern that the ugly land use does not hit the complaining land owner

where she lives—or, conversely, that the complaining land owner is trying not only to assert her fair share of use rights but also to grab her neighbor's. (Epstein 1979, pp. 60-65.)

Second, when combined with a principle of reciprocity, the live and let live test creates a simple type of zoning. The natural-rights approach does not make every particle of pollution actionable. Instead, it requires that pollution be compatible to the level of pollution in the neighborhood. This approach enlarges all owners' freedom. When zoned near one another, factories can pollute more on one another with far less complaint than if they polluted in cleaner neighborhoods. Residential owners, by contrast, enjoy more tranquility than they would enjoy in a mixed use or industrial neighborhood. (Epstein 1979, pp. 82-90; Claeys 2003, pp. 1631-32.)

At the same time, this form of zoning is less restrictive than standard Euclidean zoning, because it zones by noise level, not use. For instance, while a group of owners in a residential neighborhood would be entitled to complain if an owner tried to build a Walmart in their subdivision, they would not be entitled to complain if an owner operated a telecommuting business in her home, built a duplex, or started a small and relatively quiet café or convenience store to service the neighborhood.

Third, the physical invasion test provides an objective and measurable way for determining whether land uses should be regulated. Contemporary planning relies primarily on majoritarian politics to determine whether new or alternative land uses should be permitted. While some states (e.g., California) require zoning decisions to be tied to an adopted comprehensive plan, most local and regional land use decisions are not bound to these plans. Local political sentiment and acceptability becomes an overriding factor. Under the physical invasion test, objections must be grounded in evidence of how the proposed land use will impact

neighbors or the community. This focus inherently moves decisionmaking to more performance-based criteria for approval.

3.3 Shifting Away from Majoritarian Politics.

While the physical-invasion test may sound bright-line and formalistic, in reality it marks a pronounced transfer of power from public officials to individual land owners. This is a significant departure from contemporary planning. The contemporary process transfers a great deal of policymaking discretion to two groups—the local democratic majority and the officials who administer the zoning code. The majority creates a starting presumption about which land uses are acceptable in which neighborhoods when it votes on a master plan; the officials then have power to grant, condition, or deny exceptions within the parameters of the plan and the local zoning code. Owners have the right to choose how to use their land only as consistent with the broad guidelines set by the majority and with the discretionary judgment of the officials who rule on variances and rezonings.

The physical-invasion test inverts the relation between the public and the private owner. The physical-invasion test focuses government power on two narrow and relatively value-neutral questions—whether a given land use is physically disturbing nearby land uses and, if so, whether it is doing so above the generally accepted level in that neighborhood. (Merrill and Smith, 2001) That delegation increases owners' freedom to choose how to use their land. But it also has a pronounced effect on government: Land-use regulation becomes leaner but meaner. Contemporary planning policy requires public officials to consider all potential objections—whether tangible, aesthetic, measurable, or unmeasurable—as legitimate reasons for altering or delaying development approval. By focusing local land-use regulation on a narrower and more

objective set of questions relating to physical disruption, the natural-rights approach makes local government more focused and ultimately more vigorous in a more limited zone.

4. From Principles to Tools

Under contemporary planning, in theory and in practice, the optimal land-use pattern is the one that conforms to the existing pattern of land use. The current system is a closed system approach where innovation can be accommodated only if it captures the imagination of a political majority or was anticipated and conforms to the existing plan. No one has a presumptive right to move forward with a proposal unless it conforms to the existing plan. More importantly, the conservative nature of the process makes innovation difficult. Developers and builders find that the fastest and cheapest route to success is by proposing to build what has been approved in the past. Land use changes are only permitted if they have been anticipated in the plan. There is no systematic mechanism for accommodating spontaneous changes. Those alternatives that do exist, such as PUDs, are ad hoc and presume that each change is unique must be approved on a case-by-case basis through intense and detailed negotiation between the property owner and the local government. The proposal will not be approved until the local government approves (and agrees with) all the elements of the proposed plan.

Natural-rights theory suggests that the optimal pattern is the one which allows property owners to use their property for their own preferred uses. As an open-ended system, innovation is institutionally encouraged. Institutionally, modern zoning presumes that land uses are illegitimate until city council (or local legislative body) designates them as legitimate, most often by allowing those uses in specified use districts. Natural-rights theory, by contrast, holds that most land uses are legitimate until specifically shown to be illegitimate, most often because they

threaten the community's health or moral interests or the property rights of their neighbors (Staley and Scarlett, 1998). As a result, the natural-rights approach allows space for change and innovation to a far greater degree than contemporary zoning. Zoning locks in the *status quo*. The physical-invasion test, by contrast, leaves an owner to change land use however she likes, as long as she keeps the emissions and noise from her land use within the level tolerated in her neighborhood. (Claeys 2003, 1612-15.)

This discussion points to several more practical principles and tools for planning on the local level that can be used to frame a more innovation-friendly regulatory approach.

1. *Communities can build a presumption in favor of land development into their approval processes.* Again, owners should enjoy the right to choose how to develop undeveloped property, or to change how they use their property, provided they keep the new use broadly compatible with the level of noise and other emission customary in the neighborhood. It then follows that moratoria, application waiting periods, and other delays can restrain owners' development rights. (See Claeys, 2003, at 1661-63.) This principle can be operationalized by the following suggestions:
 - a. adopting a maximum time limit (e.g., 90 or 180 days) for planning commissions and city councils to deliberate and approval proposals;
 - b. allowing proposals to be approved automatically after a certain time period if the city council fails to act on the request; or
 - c. allowing proposals to be administratively approved unless a public objection is raised of sufficient importance to require a public hearing.
2. *Objections should be based on tangible impacts.* Criteria that could be used to operationalize these principles might include requirements that:

- a. Impacts should be measurable and quantifiable;
 - b. Only those directly affected by the proposal should be given standing in public hearings (e.g., demonstrated spillover effects on neighbors or adjacent communities);
 - c. The burden of proof should rest on those objecting to proposed developments rather than the developer to prove that an impact is insignificant;
3. *Ratify broadly defined zoning districts when they exist.* Zoning districts with broad bases of land uses are increasingly common, as communities have adopted
- a. Planned Unit Development (PUD) regulations to allow land developers to incorporate multiple uses into their projects; or
 - b. Mixed use districts to allow a more organic mix of residential and commercial land uses.
4. *Revenue-neutral planning.* Communities should avoid using new development to subsidize existing residents, or having existing residents subsidize new development. This can be operationalized by
- a. Full-cost pricing for public services to ensure users pay the full financial costs of providing water, sewer, stormwater, and other utilities;
 - b. Privatizing public utilities to avoid inadvertent subsidization; or
 - c. Carefully defined and structured impact fees to ensure the capital costs of new infrastructure are paid by the residents of the new development the infrastructure will serve.
5. *Transparency in the approval process.* Local communities must commit to ensuring information is fully and freely available to residents to ensure that they are informed

about the status or proposals and can assess the potential impacts. While developers are often fearful of putting too much information in the hands of the public, transparency ensures that public comment focuses on actual proposals rather than fears about the unknown. This can be operationalized by

- a. Giving notice to immediate neighbors;
- b. Providing summaries and renderings of development proposals free or charge, or posting them to the city's web site;
- c. Including the public in pre-application meetings between planning board, city council, and property owners with development proposals.

While many of these tools and strategies have been adopted in one form or another by select cities, no city or jurisdiction (that the authors are aware of) has applied them comprehensively as a way to regulate development (Staley and Scarlett 1998). Rather, they have been adopted piecemeal and as a response to specific issues and problems. Some cities (e.g., Barberton, Ohio) have adopted overlay districts that allow for administrative review of specific types of development. "Form-based" codes, which regulate development based on architecture and building styles rather than bulk, height, and use, are also offered as an alternative (Alminana et al. 2003; Peirce 2003), but these codes also regulate to achieve a specific type of building style (Meck 2003). The code promotes New Urbanist-style development and may be innovative in that conventional zoning and planning tends to discourage these designs. Form-based codes, however, do provide an adequate mechanism for regulating development more broadly and comprehensively (Meck 2003).

The approach outlined in this paper provides a comprehensive framework and consistent set of principles for guiding land development, regardless of land use and style. In short, the natural property rights framework provides the underlying rationale for cities to adopt these reforms as an integrated and consistent approach to planning reform.

4.1 The Case of Hong Kong

How would these tools and strategies help in streamlining the development approval process? The closest practical example might be Hong Kong, but this case is difficult to replicate given the former colony's history and political environment (Staley 1994; Lai 1996a). By virtue of Hong Kong's colonial legacy, land is owned by the government. New development is facilitated by "leasing" new land for projects through a local land auction where the winner is given temporary title to the land for a specific period of time (usually decades or more).

Hong Kong has a system of land use planning in place, but the city's economy is rooted in a capitalist culture with a strong respect for private property rights. More importantly for this discussion, leases carry zoning and planning specifications when developers purchase them at auction. Zoning, however, is very broad and accommodates substantial numbers and types of mixed uses. The result has been sustained commercial, residential, and mixed use land development. Hong Kong's economy also appears resilient and more adaptable, even though property markets form a core component of the city's economy. Building and construction industries represent almost half of the Hong Kong stock market's capitalization (Staley 1994). A fluid, flexible, and adaptable land market is critical for Hong Kong's economy, and its approach to development approval reflects this.

Unfortunately, the Hong Kong system is not easily replicable. Development approval in the United States is more open and democratic. Moreover, even though Hong Kong's approach accommodates substantial innovation and change, its ability to safeguard the public interest is less clear. A more complete application of the natural rights approach recognizes the freedom of individuals to develop property to meet changing needs as well as regulating land uses to safeguard legitimate public concerns and interest.

Thus, while the following cases are unfortunately impressionistic, their intent is to show how these principles and guidelines rooted in a nuisance based approach to development regulation can provide an integrated, more streamlined framework for evaluating development projects. Thus, this framework goes beyond ad hoc changes to the existing system, and re-grounds the entire decisionmaking process in a more consistent, integrated, and comprehensive framework.

4.2 Aesthetic Regulations

Many critics of the natural rights approach have incorrectly argued that the framework allows for a virtual land use free for all—where almost anything goes. A natural rights approach, however, is not *laissez-faire*, and these principles can be used to regulate land use even in less tangible areas such as pollution or noise. Regulation focused on aesthetics is a case in point.

On the surface, the critics appear to have a point. The natural-rights approach limits government's power to "regulate" land use through aesthetic restrictions. Cities often try to use zoning to set a list of acceptable architectural styles in which homes may be built, to maintain the property values of residential homes or to reinforce a local sense of community.

These restraining tendencies, however, do not make it impossible to enforce aesthetic restrictions under the natural-rights approach. Aesthetic laws can generate useful public benefits. Setbacks may improve the appearance of neighborhoods. Historical-preservation laws may make a neighborhood famous for a certain building or type of building. These facts, however, prove that local governments have reason to take the property owners that enjoy in use rights through eminent-domain proceedings. In such proceedings, local governments ought to pay just compensation and then, if they so choose, tax the aesthetic beneficiaries through special-assessment proceedings. (Claeys, 2004a, at 738.) As another court explained, “Aesthetic considerations are a matter of luxury and indulgence rather than of necessity, and it is necessity alone which justifies the exercise of the police power to take private property without compensation.” (*City of Passaic*, 62 A., 268.) Substantively, this eminent-domain approach forces the community to confront an important trade-off: The aesthetic benefits come at the cost of free action to restrained owners, and generally to the community. Eminent-domain and special-assessment proceedings force the community to consider whether the gains in beauty outweigh the cost in free initiative.

4.3 Mixed-Use Development

Consider the following more concrete example from a small town (pop. 9,500) in the Midwest. The town is in the “growth path” of a metropolitan area with a regional population of about 1 million people. The town has experienced rapid growth, quintupling its population over the past 30 years. Because the town is adjacent to several other cities and within 15 miles of a major urban core, the town’s recent development has been primarily suburban in character—single family detached homes on half acre lots with access to a major arterial. (Interestingly, this

pattern was established in the absence of a comprehensive plan or land use map.) The plan, zoning code, and map were established after the city had effectively completed its transformation from a rural village to a suburban town. The plan, adopted in the mid-1970s has loosely guided the development of the city since, but the primary market driver for development was suburban residential development until recently.

However, in this town and its environs, buyers have started to demand higher-density uses, mainly condominiums and townhouses. Market-rate apartment buildings have low vacancy rates, and condominiums sell out before the builders can finish construction. Moreover, in the relatively less regulated rural areas (townships), commercial uses have sprouted up along major arterials, increasing the attractiveness of the town through its proximity to transportation and urban amenities.

The village center has maintained its historical architecture and is the town's historic district. As in most towns, all land was zoned when it adopted its comprehensive plan. The land-use plan, however, has not been comprehensively updated. As a result, most new development requires a rezoning to accommodate the proposed use. Most undeveloped land is zoned agricultural. (Among other reasons, local officials have been reluctant to rezone land to follow the land market, because the variance and exceptions processes give them more power to use their discretionary authority to negotiate exactions from developers.)

In this case, a three acre parcel of vacant land sits within the Old Village boundary but is zoned for agricultural use. It currently has one small single-family home on the property. The property owner would like to redevelop the property as a mixed-use center. This center would include new townhomes adjacent to an older, moderate-income single family subdivision and a

small retail center on the main artery going into the town center. Beyond the Old Village line is open space—flood plain, parks, and athletic fields.

Under the conventional development approval process, the property owner approaches the city council to rezone the property. Since the land is currently zoned for agricultural use, he is asking for residential zoning. But, since he intends to develop the property for mixed use and densities higher than the half-acre private lot overlay, the council can accommodate the request only by changing the zoning to a residential district that allows up to 36 units per acre. The preliminary plan presented by the land owner proposes a development of about 18 units per acre—attached condominiums, and is targeted toward empty nesters.

The public hearing generates substantial public interest. Virtually all the participants object to the proposal claiming in the public hearing that the proposed development would:

- generate too much traffic;
- create demand for public services and increase local government costs;
- create crime by attracting low income families and children;
- reduce property values;
- reduce the profitability of other local businesses;
- change the character of the community

Any one of these objections could prevent this project from moving forward in the current planning system. In fact, the conventional planning approval process includes virtually no standards for evaluating or prioritizing these objections beyond the subjective conclusions of the members of the city council or planning board. Each objection is taken on face value and evaluated in the order in which it is raised and presented. No distinction is made between

potential spillover effects (broad public interests) and concerns internal to the project (largely private interests). As a result, planning boards (and city councils) often find themselves negotiating with developers over major issues such as funding traffic management solutions (e.g., a new turn lane) as well as the type of vegetation that can be used as a buffer between property owners. The process allows commissions that place a high value on public input to, in effect, let objections drive the outcome by involving citizens in negotiations over the details of the proposed plan.

Using the principles of developed from the natural-rights framework, however, local decision makers can more effectively identify priority issues and focus discussion on mitigating those factors that that invite public scrutiny. Namely, local decision makers can ask the following questions:

- Which objections have the potential to limit the exercise of other residents rights?
- Which objections/concerns are measurable and/or have tangible impacts?
- Which objections/concerns may have spillover impacts that negative impact neighbors or the community?
- Are the effects fiscally neutral on the community and neighbors?

These questions can then be answered specifically. In this case, these objections could have been evaluated the using a decision matrix such as the one depicted in Table 1. The only concerns that require mitigation are traffic congestion and revenue neutrality. The mixed use development would clearly increase the amount of traffic in the immediate neighborhood. The residential and commercial development would also increase demand for public services. These impacts can be quantified, for instance, by using trip counts estimated by consulting engineers

and service demand estimates by the local utility. The development can be changed to ensure these costs will not be carried by the community at large. In the case in which this example was based, the developer agreed that he would invest in upgrades to the local roads to handle higher traffic if the traffic exceeded the road capacity. The utility also fully priced its services so that the new development would pay for any capital improvements necessary to tap into the main sewer, water, and stormwater system.

The case of (potentially) reduced property values is of particular importance. Within a natural rights framework, the reduction in property values is not an actionable item. Property owners do not have a right to a certain level of value. Property values are a reflection of real estate markets. As such, at any given point in time, property values are a *measure* of the value of property for particular uses at specific points in the property market. Market conditions change, and property values reflect these changes. The natural rights framework uses the test of whether other peoples rights to use there property are limited by the proposed use. If these rights are attenuated, then property values may be used as a way to gauge the relative magnitude of the proposals effect.

In the actual case, many residents were concerned that higher densities also implied more children, particularly low-income children, attending the local school district which would place additional burdens on public services. The project was targeted toward empty nesters (older households without children), and the local market supported the developers' market expectations. Thus, this development would not have added a significant number of children; if anything, it would have a substantial positive impact on the local tax base. Similarly, the nature of the development clearly showed that it would enhance local property values, not reduce them, and any impact on crime rates would likely be positive.

The effect on community character was rendered moot because the proposal fit the actual development of the city and its surrounding community. Moreover, the city has relatively little ability to impact its character beyond architecture, and changing demographics were far more important influences on the community than the proposal project. Similarly, the effects on local businesses could not be measured reliably because the developer did not have a reliable way of predicting what kinds of people would rent or buy his properties. (And in any event, as mentioned above, natural-rights theory would not support an economic claim such as failure to achieve business expectations as a legitimate reason for limiting someone else's right to put his land to a legitimate and productive use.)

Using this framework has three important effects on the approval process:

1. It provides a way to objectively compartmentalize the core issues;
2. It provides a mechanism for measuring potential impacts and identifying issues that require mitigation;
3. It provides a mechanism for prioritizing community concerns to streamline the decisionmaking process.

4.4 Regional Lifestyle Center

Would the criteria or choice differ in the context of a larger project with regional implications? For a second example, consider a proposed "lifestyle center", a mixed used project spanning 72 acres at a major highway intersection. If built, the proposed project would include more than 200 townhomes and apartments, integrated into a retail, restaurant, and entertainment complex. The project is intended to be a prototype mixed-use community: pedestrian friendly,

walkable, and designed around a Town Square setting. The proposed developed is within ten miles of an urban core and between two cities with populations of 55,000 and 35,000.

The project has been controversial because of its size and its potential impact on the community. Objections have centered on issues similar to those in the previous case:

- Traffic congestion
- Community/regional character
- Impact on tax base and cost of local government services
- Impact on schools
- Impact on nearby businesses (including a strip mall across the street)
- Impact on local residential neighborhoods

As in the previous case, this project can be evaluated using a decision matrix that asked the fundamental questions posed by a property rights approach to land development regulation. The approval hinges on whether the project has an identifiable and tangible impact on the region and whether these objections rise to the level the city (and associated jurisdictions) should deny the approval.

Using the decision matrix in Table 2 to help organize the key issues using the natural property rights criteria, public objections can be more easily assessed. Clearly, a lifestyle center with major retail anchors will create a traffic impacts. These impacts will have regional implications, and will need to be mitigated. The local cities approving the project anticipate infrastructure upgrades and extensions totaling \$14.8 million in public funds (Gottschlich 2005). The lifestyle center also has the potential to significantly change the character of the community.

Yet, the proposed development is in between two major regional shopping malls, and the developers have presented their project as a distinct product catering to a different, more specialized and urban clientele (Dillon 2005). Examining neighboring land uses suggests that the project is simply reinforcing existing land use trends as one city evolves from being an suburban rural community to one with more urban characteristics. Indeed, the lifestyle center is close to one of the region's primary work centers—an air force base employing almost 20,000 people, mostly engineers and civilians. Thus, while the center will have an impact on community character, it likely reinforces existing trends and is not out of character with general trends in development (formal zoning and planning aside). Thus, this aspect probably does not require mitigation.

Public services costs are politically explosive issue. Grassroots opposition has coalesced around a group calling itself “Citizens to Protect Taxpayers” (Robinson 2005a; 2005b). Yet, the economic impact studies (commissioned by the developer but not challenged by city or planning staff) estimates the project will generate almost \$400 million in economic impact and dramatically increase the tax base by developing currently vacant land. Net annual tax revenues based on data provided by the county auditor, local school system, and developer indicate that net annual revenues will exceed \$1 million through sales and property taxes (Gottschlich 2005). Annual infrastructure costs are estimated to run about \$334,785 per year (annualized payments on debt). Even local schools will likely benefit because the residential component will cater to younger families without children. Thus, effects on the tax base and schools will generate positive impacts.

The effects on local businesses have also become an issue (Dillon 2005). From a property rights perspective, however, effects on the local business climate are not relevant. The key is

whether the proposed development will limit the rights of other property owners. In this case, since the lifestyle center is at a major highway intersection and surrounding land uses are commercial and high density residential, these rights are unlikely to be attenuated. Thus, mitigation is not necessary.

Nearby residents might be impacted given the scope of the project. The property rights approach suggests that these effects on existing property owners should be mitigated. But, in the particularly case of the lifestyle center few residences will be impacted because the surrounding land uses are primarily non-residential.

4.5 Planning, Natural Rights and Political Conflict

The case of the regional lifestyle center is particularly interesting case because the project is facing significant public opposition. Most recently, a citizens group has challenged the planning board and city council approval of the project based primarily on a concern the city is subsidizing retail development (Robinson 2005a; 2005b). Since Ohio is a referendum and initiative state, citizens can challenge the city's decision and overturn it at the ballot box.

While states allowing referenda and initiatives add a new dimension to the uncertainty of the land development process (Staley 2001), the framework proposed in this article provides a mechanism for local public officials to address, and potentially diffuse, public opposition to a project. In the case of the Greene, citizen opposition hinges on the belief that the city is “subsidizing” retail development by extending infrastructure to the project. If this were true, the private developers would not be paying the full cost of the infrastructure and other associated development costs.

This issue is relatively easily addressed and illustrates the potential benefits of the approach outlined in this paper. The key issues would be whether a subsidy in fact exists. In this case, the infrastructure costs are largely paid for through bonds and a tax increment financing district that ties revenues from the development to the investments in infrastructure (Gottschlich 2005). About 17 percent of the infrastructure costs would be truly subsidized through a federal highway grant (Gottschlich), but local communities have little direct control over these funds. Locally and regionally, the infrastructure will be funded by the developer and the immediate beneficiaries of the project through property and sales tax revenue. Thus, using a planning framework that focuses on actual impacts, the issue can be identified and addressed directly.

The uncertainty that remains for this project rests around the state's open initiative and referendum process. This is beyond the scope of authority for local planners and municipal officials, and they can influence this process only indirectly. The project itself involved negotiations among several local government entities—two cities, two school districts, and the county—and was approved through a PUD process. However, the PUD process is open ended, invites the micromanagement of projects, and extends the review and approval process. A substitute framework that allows projects to be approved based on whether impacts are tangible and mitigated allows for a cleaner, more streamlined review process. Moreover, although the issue of citizen opposition through referenda and initiative cannot be immediately addressed through this framework, grounding planning approval decisions on a consistent set of criteria that can be objectively evaluated and verified lessens the likelihood the decision can be challenged or overturned legally.

This general approach also provides a useful framework for determining which levels of government should be involved in the decision. For a regional project such as a lifestyle center

bordering multiple jurisdictions, one municipality should probably not be the final decisionmaker. A property-rights approach implicitly values the impacts on other communities and neighborhoods and provides objective criteria for determining whether they should become part of the decision making process (and thus influence final approval). Moreover, it helps determine at which level governments should be involved.

In this case, a lifestyle center is likely to affect transportation on a regional level. If regional transportation investments are determined by governmental agencies larger than a municipality (e.g., county or state governments), those organization should be incorporated into the decision making process. Thus, the level and type of impact is what determines which governmental agencies and units are incorporated into the final approval process and at one level.

While many developers are justifiably skeptical of incorporating multiple governments or agencies into an approval process, a property rights approach provides mechanism for minimizing the uncertainty and controversy surrounding the decision because it applies more objective criteria. Agencies cannot stop a development unless they can show that an impact will have measurable impact, have negative consequences on those effected by the investment, and cannot be mitigated.

5. Implications for Innovation in Real Estate Development

It is becoming more and more difficult to secure approvals on innovative real estate development projects. These difficulties are likely to become even greater as Smart Growth regulation spreads, for that movement grants more political discretion over land development decisions. Using the overarching principle that more citizen involvement is beneficial, the

micromanagement of development proposals is even more likely and development approval less certain (Staley 2001a; 2001b). The result will likely be fewer opportunities to invest in innovative designs, even when they meet unmet needs in the market.

Planners, urban designers, developers, and elected officials seriously interested in promoting innovation should fundamentally rethink the development approval process in conventional planning. The current approach discourages innovation and the approval process encourages conformity and “inside the box” thinking about investments in real estate.

An alternative approach would be to adopt a more open-ended regulatory framework that explicitly addresses the concerns most citizens and policymakers have about development—the perceived and real spillover impacts that result from significant long term investments. This approach is rooted in a respect and protection for private property rights. More importantly, it provides a mechanism for providing more objective criteria for approving development proposals, clearer guidance on when thresholds for approval have been met, and a more legally resilient approach to development approval. This approach would likely bring much needed objectivity to the development approval process, reducing uncertainty and the potential for the political manipulation of planning outcomes.

This is clearly a long-term approach to reforming the planning system, but it has much to offer. It helps governments set manageable priorities. It may be the most fruitful approach to protect the public interest and at the same time to foster much-needed innovation.

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Table 1. Decision Matrix for Evaluating Public Objections to Local Development Proposal

<i>Concerns</i>	<i>Project Limits Other Rights?</i>	<i>Is Impact Measurable?</i>	<i>Is Impact Negative?</i>	<i>Should It Be Mitigated?</i>
Traffic congestion	yes	yes	yes	yes
Revenue neutrality	yes	yes	yes	yes
create crime	yes	yes	no	no
reduce property values	no	yes	no	n/ap
local profitability	no	no	n/ap	n/ap
community character	no	no	n/ap	n/ap

Table 2. Decision Matrix for Evaluating Public Objections to Regional Development Proposal

<i>Concerns</i>	<i>Project Limits Other Rights?</i>	<i>Is Impact Measurable?</i>	<i>Is Impact Negative?</i>	<i>Should It Be Mitigated?</i>
Traffic congestion	yes	yes	yes	yes
Community character	yes	no	unknown	no
Tax base	yes	yes	no	no
Schools	yes	yes	no	no
Local business profits	no	no	n/ap	no
Nearby residences	yes	yes	yes	yes